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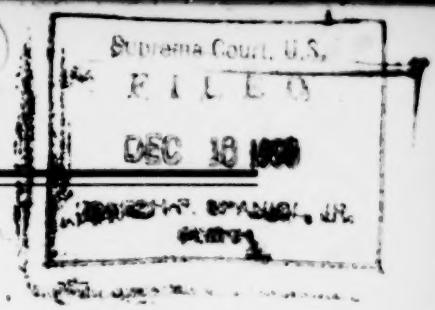

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA and FRANK S. ZOLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: December 18, 1990

QUESTIONS PRESENTED

1. Whether the court of appeals erred in reviewing *de novo* the district court's finding that the evidence failed to establish the crime-fraud exception to the attorney-client privilege, including the finding of an absence of evidence of intent to commit future crimes or frauds?

2. Whether the court of appeals erred in determining that the crime-fraud exception to the attorney-client privilege applied without reviewing the evidence submitted to the district court by the privilege holder, and without itself reviewing or affording the district court the opportunity to review the attorney-client communications *in camera* prior to their release?

3. Whether the court of appeals' *de novo* determination that the crime-fraud exception applies on this record will so eviscerate the attorney-client privilege that review by this Court is necessary?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.1 LIST

The parties to the proceedings below were:

The Church of Scientology of California
Mary Sue Hubbard
United States of America
Frank S. Zolin

Petitioner Church of Scientology of California has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

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—v.—

UNITED STATES OF AMERICA and FRANK S. ZOLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Church of Scientology of California ("the Church") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the Ninth Circuit denying rehearing and a suggestion for rehearing *en banc* (1a) is unreported. The opinion and order of the Ninth Circuit (2a-4a), reported at 905 F.2d 1344, followed the remand from this Court in *United States* v. *Zolin*, ____ U.S. ____, 109 S.Ct. 2619 (1989). The order of the *en banc* court, prior to this Court's decision, vacating the order granting rehearing (7a-15a) is reported at 842 F.2d 1135. A subsequent concurrence to that order (5a-6a) is reported at 850 F.2d 610. The earlier order of

the *en banc* court granting rehearing (16a) is reported at 832 F.2d 127. The initial opinion of the panel (17a-30a) is reported at 809 F.2d 1411. The April 30, 1985, order of the district court (33a-35a), and the June 10, 1985, order of the district court denying reconsideration (31a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1990 (2a). On September 19, 1990, the court of appeals denied petitioner's timely petition for rehearing and suggestion for rehearing *en banc* (1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Fed.R.Evid. 501 provides in pertinent part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . .

STATEMENT OF THE CASE

The underlying facts are set forth in this Court's opinion in *United States* v. *Zolin*, 109 S.Ct. 2619, 2622-25 (1989), which may be summarized as follows.

1. On January 18, 1985, the government commenced this proceeding, pursuant to 26 U.S.C. §§ 7402, 7602 and 7604, by filing a petition in the district court to enforce an Internal Revenue Service summons served upon the County Clerk for Los Angeles County, seeking production of numerous

exhibits which were held under seal in a pending Superior Court action entitled *Church of Scientology of California* v. *Armstrong* (No. C420153). The Church and Mary Sue Hubbard intervened in the district court to oppose enforcement of the summons, on the ground relevant here that two tape recordings ("the MCCS tapes") of meetings held in 1980 between representatives of the Church and legal counsel are protected by the attorney-client privilege (18a).

The government asserted that the crime-fraud exception to the privilege applied to the MCCS tapes, and submitted partial transcripts from the tapes contained in the Declaration of Gerald Armstrong, and filed in an unrelated proceeding (Supp.E.R. 57-62),[1] as well as a declaration of a participant in the communications—Laurel Sullivan (*Id.* at 63-72). The government subsequently submitted a seventeen-page partial transcript of the tapes in support of its position (*Id.* at 38-56).

The Church submitted declarations from Lisa Britowich, a Church representative (Church's Supp.E.R. 1-4), and from James M.A. Murphy, a senior tax partner in the Los Angeles law firm of Rosenfeld, Meyer, and Susman, who represented L. Ron Hubbard's interests in the MCCS project (*Id.* at 5-9), both of whom participated in the second conversation at issue here. After considering all the evidence before it, including the transcripts the government had submitted, the district court held that the Church had established all the prerequisites of the attorney-client privilege, and that the government had failed to show the planning of a future crime or fraud and thus had not established the crime-fraud exception (34a).

A panel of the United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment (17a-30a). The panel held that before the privileged status of the communications may be lifted on the basis of the crime-fraud

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1 "Supp.E.R." refers to the Supplemental Excerpts of Record filed by the government in the court below in its initial appeal. "Church's Supp. E.R." refers to the Church's Supplemental Excerpts of Record filed in that appeal.

exception, the government must first make a *prima facie* showing independent of the communications themselves of an ongoing crime or fraud (27a-29a), and the government's evidence was "not sufficient to make out the requisite prima facie showing of intended illegality" (30a).

Thereafter, the government's petition for rehearing *en banc* was granted on the crime-fraud issue (16a). The *en banc* court subsequently vacated the order granting *en banc* review as improvidently granted, and reinstated the panel decision, with certain modifications (7a-8a). Three members of the *en banc* court dissented, but they nevertheless would have affirmed the district court's rejection of the crime-fraud exception based on a review of all the evidence, including the transcripts (15a). The dissent also found that the district court did not abuse its discretion in refusing to consider evidence submitted by the government *after* its ruling, and in determining not to review the tapes *in camera* (*Id.*). The dissenters would have created a rule that "would make in camera review discretionary for the district court to reject the crime-fraud exception, mandatory for the district court to allow the exception and order disclosure" (*Id.*).

2. The government then sought and obtained review in this Court of the independent evidence rule articulated by the court below. In an unanimous opinion, this Court rejected both the independent evidence rule and the government's position that would have mandated *in camera* review of otherwise privileged documents. Rather, the Court articulated the standard under which *in camera* review of privileged material might be undertaken:

> Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," *Caldwell* v. *District Court*, 644 P.2d 26, 33 (Colo. 1982), that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

> Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court.

Zolin, 109 S.Ct. at 2631.

This Court then considered the evidence a district court could review in determining whether to engage in *in camera* review. The Court held that "the threshold showing to obtain *in camera* review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged." *Id.* at 2632. This Court noted that whether the partial transcripts in this case were privileged and whether they were lawfully obtained remained an open question. *Id.* at 2624 n.5, 2631. This Court further held that the evidence that may be reviewed to determine if *in camera* review is appropriate "also may provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies." *Id.* at 2632 n.12. This Court vacated the judgment of the court of appeals, and remanded for further proceedings consistent with its opinion. *Id.* at 2632.

3. On remand, the court of appeals examined the government's evidence, including the partial transcripts, and held that this evidence established the crime-fraud exception (3a-4a). The decision is clear that the court only considered the government's evidence (3a), and ignored the Church's countervailing evidence that compellingly demonstrated that the communications were not in furtherance of ongoing or future crimes or frauds.

The court's entire analysis of the crime-fraud issue is as follows:

> The partial transcripts demonstrate that the purpose of the MCCS project was to cover up past criminal wrongdoing. The MCCS project involved the discussion and planning of future frauds against the IRS, in violation of 18 U.S.C. § 371. *See, e.g., United States* v. *Carruth*, 699 F.2d 1017, 1021 (9th Cir. 1983), *cert. denied*, 464 U.S. 1038. . . (1984). The figures involved in MCCS admit on the tapes that they are attempting to

> confuse and defraud the U.S. Government. The purpose of the crime-fraud exception is to exclude such transactions from the protection of the attorney-client privilege.

(4a). The court nowhere attempted to reconcile its findings of the purpose of the MCCS project with the findings of the district court and the three *en banc* dissenters, who had reviewed the identical evidence and found a lack of evidence concerning intent to commit future crimes or fraud. Nor did the court point to where the participants in the communications admit they are attempting to defraud the United States.

The court then stated that "[o]n remand the district court should admit the MCCS tapes into evidence, subject to any objections the parties might make at that time" (4a).[2] The court also reserved to the district court the issue of the potential illegality of the government's access to the transcript (4a).[3]

The court below apparently precluded *in camera* review of the tapes by the district court to determine if, on complete review, the communications on the tapes were in fact in furtherance of a crime or fraud, or to permit the court to excise those portions of the tapes that might be unrelated to the crime or fraud, as urged by the *en banc* dissent (13a, 15a). Indeed, the court did not even address this issue, which the Church had explicitly raised. Church's Remand Br. at 16 n.14.

The Church's timely petition for rehearing and suggestion for rehearing *en banc* was denied on September 19, 1990 (1a).

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2 There is in fact no proceeding into which the tapes may be admitted. This is a summons enforcement action, and the IRS has only sought to obtain access to the tapes, not to admit them into evidence in any proceeding.

3 The court of appeals did not reach this issue because "[t]he Church did not raise this issue in its original appeal . . . ." (4a n.2) (emphasis added). The Church, however, *prevailed* on the MCCS tapes issue in the district court; the *government* appealed the decision, *not* the Church.

REASONS FOR GRANTING THE PETITION

This case presents three related questions of exceptional importance to the issue whether attorneys will continue to be able to give their clients fully informed and sound legal advice, without undue fear that their attorney-client communications will be divulged to their adversaries. Review by this Court is necessary to resolve important evidentiary issues upon which the lower courts are in fundamental disagreement and which, if left unresolved, will create great uncertainty in this highly sensitive area and which will lead to unnecessary and meritless loss of the attorney-client privilege.

First, the court of appeals improperly reviewed *de novo* the district court's findings, particularly its factual findings concerning the lack of intent of the participants to the communications to plan present or future crimes or fraud. The court of appeals' failure to give any deference to the district court's findings is inconsistent with decisions of this Court that findings of intent are reviewed for clear error, and of other courts of appeals which review a district court's crime-fraud determinations for clear error or abuse of discretion. Under a proper deferential standard of review, the district court's findings should be affirmed.

Second, the court of appeal's exclusive reliance on the evidence submitted by the opponent of the privilege, and its failure to consider evidence submitted by the proponent of the privilege, will frequently, as here, result in the improper stripping away of the privilege. This Court should make clear, as it suggested in *Zolin*, 109 S.Ct. at 2626 n.7, that a court must consider evidence proffered by both sides before the exception may be found. In addition, the court below acted contrary to other courts of appeals by failing to permit or require district court review of the communications to ensure that only unprivileged material is released. Upon a finding, without review of the documents themselves, that the crime-fraud exception applies, the district court should review the communications *in camera* to determine if they in fact support that finding and also whether portions of the com-

munications may be redacted prior to release of the communications.

Third, if the evidence here is deemed so compelling that the district court's decision was either clearly erroneous or an abuse of discretion, then it is difficult to comprehend how attorneys can offer to entities or individuals with legal problems resulting from past activities the full and frank legal advice necessary to restructure corporate or financial relations legally to avoid such problems in the future. Review by this Court is necessary to make clear that an appellate court may not strip away the privilege by substituting its speculative inferences for the findings of a district court.

I. The District Court's Determination Regarding The Crime-Fraud Exception Should Be Reviewed For Clear Error Or Abuse Of Discretion, Not *De Novo*

In *Zolin*, this Court set forth the fundamental principles of the attorney-client privilege:

> We have recognized the attorney-client privilege under federal law, as the oldest of the privileges for confidential communications known to the common law. Although the underlying rationale for the privilege has changed over time, courts long have viewed its central concern as one to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. That purpose, of course, requires that clients be free to make full disclosure to their attorneys of past wrongdoings, in order that the client may obtain the aid of persons having knowledge of the law and skilled in its practice.

109 S.Ct. at 2625-26 (footnote, internal citations and quotations omitted). As this Court stated in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981), "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege,

or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 393.

This Court also recognized that the privilege must give way if the attorney-client communications were in furtherance of future crimes or fraud:

> The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*. It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.

Zolin, 109 S.Ct. at 2626 (emphasis in original, internal citations and quotations omitted). This Court did not address the proper standard of review of the district court's ultimate determination of the crime-fraud issue, although it did hold that "the decision whether to engage in *in camera* review rests in the sound discretion of the district court." *Id.* at 2631.

The court below also did not articulate the standard by which it reviewed the district court's finding that the government failed to establish the crime-fraud exception, but it clearly reviewed the evidence *de novo*. As the court stated: "We must therefore examine the transcripts and determine whether they . . . demonstrate sufficient evidence of intended illegality. . . ." (3a). There is no hint that the court reviewed the district court's findings, based on the exact same evidence, either for clear error or for abuse of discretion.[4]

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4 The court below appears to have understood this Court's remand order to authorize it to determine the crime-fraud exception in the first

In the initial appeal of this matter, however, the court below had held that, where the relevant scope of the attorney-client privilege is clear, and the district court's decision is essentially factual, this Court reviews "for clear error" (26a). The court had also held that "rulings on the scope of the attorney-client privilege [that] involve mixed questions of law and fact . . . are reviewable *de novo*" (*Id.*). Because the scope of the privilege is clear, in light of this Court's decision in *Zolin*, and the district court made an essentially factual determination that the transcripts and other evidence demonstrated only possible admission of past misdeeds, not an intent to commit future crimes or frauds, the court below should have reviewed for clear error. *See also United States* v. *Dyer*, 722 F.2d 174, 176 (5th Cir. 1983).[5]

Alternatively, the court below should have reviewed the district court's findings for abuse of discretion, not *de novo*. Thus, the prior *en banc* dissent would have reviewed the district court's crime-fraud determination for "abuse of discretion" (15a). Similarly, the majority of circuits have adopted an abuse of discretion standard of review of the district court's crime-fraud determination. *See, e.g., In re Grand Jury Subpoena*, 884 F.2d 124, 127 (4th Cir. 1989); *In re Grand Jury Investigation*, 842 F.2d 1223, 1226-27 (11th Cir.

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instance (3a-4a). In the context of the issues previously presented for review and disposed of by this Court, however, it is clear this Court was simply returning the issue to the lower courts. It certainly did *not* instruct the court of appeals to review the evidence *de novo*.

5 The First Circuit also applies a "clearly erroneous" standard for attorney-client privilege questions in general. *See United States* v. *Bay State Ambulance and Hospital Rental Service, Inc.*, 874 F.2d 20, 27 (1st Cir. 1989) ("A district court's determination regarding the existence of [the attorney-client] privilege is factual in nature," and therefore a " 'finding of no privilege can be overturned only if clearly erroneous.' ") (quoting *United States* v. *Wilson*, 798 F.2d 509, 512 (1st Cir. 1986)); *see* 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 104[04], at 104-29 to -31 (1990). Because the inquiry is essentially factual, the court in *Wilson* rejected both an abuse of discretion and a *de novo* standard in favor of the "clearly erroneous" standard of review of a district court's determination of the existence of the attorney-client privilege. *Wilson*, 798 F.2d at 512.

1987); *In re Sealed Case*, 754 F.2d 395, 399-400 (D.C. Cir. 1985); *Ward* v. *Succession of Freeman*, 854 F.2d 780, 789-90 (5th Cir. 1988); *In re Special September 1978 Grand Jury II*, 640 F.2d 49, 59 (7th Cir. 1980); *In re Berkley & Co.*, 629 F.2d 548, 553 (8th Cir. 1980); *In re September 1975 Grand Jury Term*, 532 F.2d 734, 737 (10th Cir. 1976). In any event, the deferential "abuse of discretion" standard would differ little from a "clear error" standard in the context of this case.

In *United States* v. *Laurins*, 857 F.2d 529 (9th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 3215 (1989), the court acknowledged the Ninth Circuit's disagreement with other circuits on this issue, although it incorrectly stated that only three circuits follow the abuse of discretion rule. *Id.* at 541.[6] The Ninth Circuit appears to be the only circuit that reviews a district court's crime-fraud determination *de novo*. Although the court purports to apply this standard only when the scope of the privilege is unclear (26a), this was clearly not the case in the proceeding below.

The district court indisputably applied the appropriate legal standard for determining the crime-fraud exception, as later articulated by this Court in *Zolin*. The district court required the government to demonstrate that the communications were in furtherance of a future or ongoing crime or fraud, not a past crime, and the district court reviewed all the evidence before it, including the partial transcripts, to see if the government made out its case. Finding insufficient evidence of planning of future crimes or fraud, the court declined to vitiate the privilege, and exercised its discretion not to conduct an *in camera* review of the tapes (31a-32a, 34a).[7] The court of appeals applied the same clear legal standard on remand

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6 As noted, *supra*, at the time of the decision in *Laurins*, at least six circuits (now at least seven) followed an abuse of discretion standard.

7 The district court found that the government had waived any request that it review the tapes themselves (31a-32a). Both the *en banc* dissent (15a), and the panel below, at least implicitly (3a n.1), agreed with this exercise of the district court's discretion.

from this Court, but, without explanation, gave no deference to the district court's findings.

When the legal standard is properly applied, as here, the crime-fraud issue turns on a finding of the client's intent or purpose in communicating with the attorney. *See Zolin*, 109 S.Ct. at 2626 (issue is whether the "*communications* [are] made for the *purpose* of getting advice for the commission of a fraud or crime")[8] (emphasis added, internal quotations omitted); *United States* v. *White*, 887 F.2d 267, 271 (D.C. Cir. 1989) (before the crime-fraud exception applies, the attorney-client communications "must actually have been made with an *intent* to further an unlawful act" (emphasis added); 8 J. Wigmore, *Evidence*, § 2298, at 573 (McNaughton ed. 1961) ("advice [must] be sought for a *knowingly* unlawful end") (emphasis in original); McCormick, *Evidence* § 95, at 200, (2d ed. 1972) ("client's guilty intention is controlling"); Note, *The Crime or Fraud Exception to the Attorney-Client Privilege*, 51 Brooklyn L.Rev. at 913, 937 (1985) ("The crime or fraud exception focuses on intent.").

Issues of intent are indisputably questions of fact. Thus, the district court's finding of a lack of evidence that a "future crime or fraud is being planned" (34a) was "essentially factual," *i.e.*, one that is founded "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct." *Commissioner* v. *Duberstein*, 363 U.S. 278, 289 (1960). The district court must resolve on a day-to-day basis numerous evidentiary and discovery issues, including privilege questions, and is in daily contact with members of the bar in a variety of fora (*e.g.*, jury trials, conferences, oral arguments, and supervision of grand jury proceedings). The district court is clearly in a superior position to the appellate court to determine whether the often blunt and colorful language employed by attorneys in providing legal advice to their clients, or in acknowledging existing

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8 To the extent the court of appeals relied on the purported purpose of the MCCS project, rather than whether the attorney-client *communications* were in furtherance of that purpose, the court of appeals conclusions are legally irrelevant.

legal problems from past activities, constitutes intent to engage in an illegal cover up of past crimes or simply candid recognition of past wrongdoing and frank assessment of future concerns.

The "essentially factual" nature of the inquiry here is made explicit by the court below's finding that the "*purpose* of the MCCS project was to cover up past criminal wrongdoing" (4a) (emphasis added), that the government made out its "case on *intended* illegality" (*id.*) (emphasis added), and its reliance upon 18 U.S.C. § 371 and *United States* v. *Carruth*, 699 F.2d 1017, 1021 (9th Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984), for the crime of conspiracy to defraud the United States purportedly revealed in the partial transcripts (4a). In *Carruth*, the court recognized that this crime requires proof of *intent* to defraud the United States and that "*the evidence* shows that this was the defendants' intent." 699 F.2d at 1021 (emphasis added). The circuit courts have repeatedly recognized that a conspiracy to defraud the United States requires a showing of *intent* to defraud, which is a factual question. *See, e.g.*, *United States* v. *Smith*, 891 F.2d 703, 713 (9th Cir. 1989), *cert. denied*, ____ U.S. ____, 111 S.Ct. 47 (1990); *United States* v. *Gaddis*, 877 F.2d 605, 608 (7th Cir. 1989); *United States* v. *Bordelon*, 871 F.2d 491, 493-94 (5th Cir.), *cert. denied*, ____ U.S. ____, 110 S. Ct. 121 (1989); *United States* v. *Rankin*, 870 F.2d 109, 113 (3d Cir. 1989).

In *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), this Court made clear that questions of intent or motive (or "purpose") are pure questions of fact, subject to a clearly erroneous standard of review, pursuant to Fed. R. Civ. P. 52(a). *Id.* at 285-90. "Treating issues of intent as factual matters for the trier of fact is commonplace." *Id.* at 288. Indeed, this Court has held on numerous occasions that questions of intent or motive are fact questions reviewed under a "clearly erroneous" standard. *See Amadeo* v. *Zant*, 486 U.S. 214, 221-223 (1988) (finding of absence of attorney's intent to forgo procedural challenges in criminal case is factual question); *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 534 (1979); *Duberstein*, 363 U.S. at 286; *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949) ("Findings as to

the design, motive and intent with which men act" are peculiarly factual issues for the trier of fact).

As this Court held in *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982), "An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.' " *Id.* at 857-58 (*quoting United States* v. *Real Estate Boards*, 339 U.S. 485, 495 (1950)). In *Inwood*, the Court held that whether a party had intentionally induced pharmacists to mislabel generic drugs was a question of fact. *Id.* at 855.

Thus, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson* v. *Bessemer City*, 470 U.S. 564, 573-74 (1985). "This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.* at 574.

This Court has also made clear that Rule 52(a) "does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Swint*, 456 U.S. at 287. Thus, whether considered as a subsidiary or an ultimate fact, the issue whether the partial transcripts reveal an intent to defraud the IRS by covering up past criminal wrongdoing is a factual question for the district court that the appellate courts must review for clear error.

As noted, *supra*, the majority of circuits review a district court's determination of the crime-fraud exception for abuse of discretion. This standard apparently follows the general, well-settled principle that "[e]videntiary rulings . . . are not reversible absent clear abuse of discretion." *Jauregui* v. *City of Glendale*, 852 F.2d 1128, 1132 (9th Cir. 1988) (internal quotations omitted). Although the question of the client's intent in seeking an attorney's advice should be reviewed for clear error, it may well be that in certain circumstances the

ultimate determination of the crime-fraud issue is not purely factual and should be reviewed for abuse of discretion, as are most evidentiary rulings. Here, however, the key issue is the intent or "purpose" of the clients in consulting and communicating with their attorneys. This issue is purely factual, and hence subject to review for clear error. In any event, whether the appropriate standard of review is abuse of discretion or clear error would make no difference in this case or, presumably, in most other cases.

Because the court below improperly reviewed the district court's findings *de novo*, this Court should make clear that a district court's determination of the crime-fraud exception, and particularly the issues of intent to commit future crimes or fraud, must be reviewed for clear error or, alternatively, for abuse of discretion. Whatever the proper standard, this Court should explicitly reject the *de novo* standard of review applied below in reversing the district court's findings.

II. The Evidence Proffered By The Privilege's Proponent Must Be Reviewed Before The Privilege Is Dispelled.

In *Zolin*, this Court addressed the question of what evidence the district court could review to determine whether the crime-fraud exception had been established. This Court, however, explicitly declined to "decide the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception." *Id.* at 2626. Nevertheless, this Court questioned the practice of some courts of reviewing only one party's evidence to determine if a "*prima facie* case" had been met:

> We note, however, that this Court's use in *Clark* v. *United States*, 289 U.S. 1, 14 (1933), of the phrase "*prima facie* case" to describe the showing needed to defeat the privilege, has caused some confusion. See . . . Note, 51 Brooklyn L. Rev. 913, 918-919 (1985) ("The *prima facie* standard is commonly used by courts in civil litigation to *shift* the burden of proof from one party to the other. In the context of the fraud exception, however, the standard is used to dispel the privilege alto-

> gether *without* affording the client an opportunity to rebut the *prima facie* showing" (emphasis in original)). . . . The quantum of proof needed to establish admissibility was then, and remains, subject to question. See, *e.g.*, Maguire & Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392, 400 [1927] (criticizing courts insofar as they "have allowed themselves to be led into holding that only a superficial, one-sided showing is allowable on any admissibility controversy"). . . .

Id. at 2626-27 n.7.

Because a finding of the crime-fraud exception dispels the privilege altogether—which results in otherwise privileged communications being made available to one's adversary—and perhaps the public as well—it is essential that the crime-fraud determination be reasonably correct. To ensure such reliability, a court should review the *proponent's* evidence proffered to rebut the evidence of the crime or fraud prior to determination of the issue. Such a requirement comports not only with notions of fundamental fairness and the basic premises of our adversary system, but also appears to be compelled by Fed. R. Evid. 104(a), pursuant to which courts determine the crime-fraud exception issue. *See Zolin*, 109 S.Ct. at 2631. Thus, the Advisory Committee's Note to Fed. R. Evid. 104(a) states, "If the question is factual in nature, the judge will of necessity receive evidence *pro and con* on the issue." (Emphasis added); *see also* McCormick, *supra*, § 53, at 122; Maguire & Epstein, *supra*, 40 Harv. L. Rev. at 399-401.

Other commentators have specifically urged that courts should not find that the crime-fraud exception applies without receiving evidence from the privilege holder. *See, e.g.*, Note, *supra*, 51 Brooklyn L.Rev. at 938 ("By refusing to provide clients with an opportunity to dispute the *prima facie* showing of fraud prior to disclosure, courts have prevented clients from effectively protecting their claims of privilege."); Note, *The Future Crime or Tort Exception to Communica-*

tions Privileges, 77 Harv. L.Rev. 730, 740 (1964) (upon preliminary showing of crime-fraud exception, "the ultimate burden of persuasion ought to return to the person claiming privilege"). In *In re Berkley*, 629 F.2d 548 (8th Cir. 1980), the court held that the "ultimate question of the relevance and admissibility of the [attorney-client] documents at trial may then be determined, but only after all parties have had an opportunity to be heard." *Id.* at 555.[9]

The effect of a rule in which a court ignores the evidence of the privilege's proponent, as occurred here, is that confidential attorney-client communications that are in fact unrelated to furtherance of a crime or fraud will be disclosed, with consequent undermining of the certainty of the privilege and harm to the fundamental values served by the privilege. A standard that requires consideration of both parties' evidence *prior* to stripping away the privilege responds directly to the concerns raised by this Court—it best comports with fairness and the principles of the adversary system, best weighs the competing concerns of the privilege with the exception, and is certainly a more accurate method of resolving the issue.

In this case, the district court considered evidence submitted by both the proponent and the opponent of the privilege. Indeed, petitioner submits that the evidence it submitted to the district court played an important role in placing the taped conversations in the proper context and convincing the

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9 The apparent concern expressed in *Berkley* and *In re Sealed Case*, 676 F.2d 793, 815 n.88 (D.C. Cir. 1982), that consideration of both parties' evidence might be inappropriate in grand jury proceedings, in contrast to trial proceedings, is easily addressed by leaving to the district court's sound discretion the nature and extent of the evidence it will consider. *Cf. Zolin*, 109 S.Ct. at 2631-32. Here, the district court accepted two declarations submitted by the privilege's proponent that explained the benign purpose of the communications, and briefing and argument directed to demonstrating that the government's evidence failed to satisfy its burden. No argument has been or could be made that the district court erred in these circumstances in receiving and considering the Church's evidence. Moreover, the court below did not limit its holding to preliminary proceedings, but rather stated that the tapes should be admitted into evidence without further inquiry (4a).

district court that the conversations were not in furtherance of a crime or fraud. No reason exists to preclude a district court from reviewing *all* the relevant unprivileged evidence before making such an important decision as dispelling the attorney-client privilege. Whether a *district court* must in all circumstances be compelled to consider all the proponent's evidence on the crime-fraud issue need not be decided here. When it has done so, however, the *court of appeals* should not be permitted to reverse the district court's findings without even reviewing the evidence considered by the district court.

The court below clearly failed to consider the Church's evidence, which rebutted the government's evidence and placed it in context. The court specifically listed the evidence it reviewed to reach its decision—the *government's* independent evidence and the partial transcripts (3a-4a).[10] The court not only did not consider the Church's evidence, but it gave no reason for its failure to do so. Furthermore, it provided no explanation how the district had erred in finding, based on *all* the evidence, that the government had failed to establish the crime-fraud exception.

This case presents a particularly stark example of the need to review both parties' evidence. As set forth in Point III, *infra*, the Church's evidence helps establish that the purpose of the MCCS project was not to cover up past criminal wrongdoing and that the communications were not in furtherance of any future frauds against the IRS, as the court below mistakenly concluded. At a bare minimum, this evidence should have been explicitly considered by the court below before stripping away the privilege.

Moreover, when a court has determined, without reviewing the disputed communications or documents themselves, that the communications were in furtherance of a crime or fraud, the district court should review the conversations *in camera*

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10 The Church relied upon and urged the court of appeals throughout this proceeding to review the evidence it had submitted to the district court before determining whether the government had established the crime-fraud exception. *See* Church's Answering Brief, at 27, 29 n.26, 35 n.31; Church's Remand Br. at 9 n.7, 14-16.

prior to their release, at least when, as here, urged to do so by the privilege holder. *See* Church's Remand Br. at 16 n.14. Such review will enable the district court to determine if the documents in their entirety support or rebut the finding of crime or fraud, and it would permit redaction of privileged discussions unrelated to the crime or fraud.

Such mandatory *in camera* review prior to disclosure was urged by the earlier *en banc* dissent in this matter: "For additional protection of privileged documents—to avoid disclosure of innocent documents—I would also set out a rule that requires district courts to *allow* the crime-fraud exception only in relation to communications that the court individually has inspected in camera." (13a) (Beezer, J., dissenting) (emphasis in original); (15a); *see also In re Impounded Case (Law Firm)*, 879 F.2d 1211, 1214 (3d Cir. 1989) (minimal risk of release of privileged documents because "disclosure [of attorney-client communications] can be obtained only in a context where the district court will first evaluate, *in camera*, the right of the government to gain access to the documents") (citing *Zolin*, 109 S.Ct. 2619); *In re Grand Jury Investigation*, 842 F.2d 1223, 1228-29 (11th Cir. 1987) (permitting privilege holder "to submit to the court for an *in camera* review any documents he believes remain privileged"); *In Re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986) ("Not only do we believe *in camera* review is mandated to determine the scope of the order, *in camera* review of the documents could have assisted the court in determining whether a *prima facie* violation had been made.");[11] *In re National Mortgage Equity Corp. Mortgage Pool Certificates Litigation*, 116 F.R.D. 297, 302 (C.D.Cal. 1987); *In re A.H. Robins Co., Inc.*, 107 F.R.D. 2, 15 (D.Kan. 1985).

In *Zolin*, this Court implicitly recognized the propriety of such review prior to disclosure of otherwise privileged com-

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11 The court of appeals in *Antitrust Grand Jury* ordered the district court to engage in *in camera* review in response to the district court's ruling that *all* the disputed documents be produced *en masse*; the clear intent of the court's order was that *in camera* review would *limit* disclosure by preventing the release of privileged communications that did not fall within the crime-fraud exception. *See* 805 F.2d at 168.

munications. *See Zolin*, 109 S.Ct. at 2627 n.9 (noting with approval "that *in camera* review is permitted under Circuit precedent in different circumstances from those at issue in this case--*i.e.*, . . . when the proponent requests *in camera* review to ensure that an order requiring production of some materials held not to be privileged does not inadvertently yield privileged information"). Here the court of appeals apparently foreclosed such district court review by finding the tapes unprivileged and ordering the district court to "admit the MCCS tapes into evidence" (4a).

Even if *in camera* review prior to disclosure need not be required in all cases, certainly the district court should have discretion to engage in such review when so urged by the privilege holder, particularly when the crime-fraud showing is a close question. *Cf. Zolin*, 109 S.Ct. at 2631 (decision whether to engage in *in camera* review to determine crime-fraud issue "rests in the sound discretion of the district court"). In this case, of course, both the district court and the three *en banc* dissenters reviewed the same evidence submitted by the government as did the three-judge panel below, yet came to the opposite conclusion.[12] In such closely contested circumstances, the district court should not order the communications released until it has actually reviewed them. At an absolute minimum, it should at least have the option to do so.

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12 Indeed, the two other courts that have considered this privilege issue also rejected the crime-fraud exception, even after reviewing the Armstrong Declaration, Supp.E.R. 57-62, which contains substantial transcripts of the tapes, including the portions upon which the government primarily relies. *See Church of Scientology* v. *Armstrong*, C420153 (Cal.Sup.Ct. Feb. 11, 1985); *Bear* v. *Church of Scientology of New York*, 81 Civ. 4688, slip. op. at 5-7 (S.D.N.Y. Dec. 5, 1985) ("no significant evidence . . . that the restructuring project . . . involved the intended commission of a fraud").

III. A Finding Of Crime Or Fraud On This Record So Chills Attorney-Client Communications That Review By This Court Is Necessary

Without so much as a single reference to the evidence, the findings of the district court, the *en banc* dissent, or the decisions in *Armstrong* or *Bear*, *see* n.12, *supra*, the court below held that the transcripts demonstrate "the discussion and planning for future frauds against the IRS," and that "[t]he figures . . . admit on the tapes that they are attempting to confuse and defraud the U.S. Government" (4a). Petitioner submits that this finding on this record will so chill attorney-client communications that an exercise of this Court's power of supervision is essential to establish appropriate standards that will protect full and frank attorney-client communications from charges of furthering crime or fraud. If the position of the court below is accepted, virtually any time an individual facing prosecution or a government enforcement proceeding seeks an attorney's advice for possible past misdeeds, with the hope and *intent* that he not be found guilty or liable, then even if neither the attorney nor the client does anything further that is illegal or unethical, the communications must be divulged unless the attorney or client confesses the possible wrongdoing. The evidence upon which the court below relied demonstrates that this assertion is neither exaggeration nor hyperbole.

The court below ignored several basic legal principles that should have guided its decision. The crime-fraud exception does not apply to privileged communications—no matter how blunt or colorful—concerning past events which may have constituted a crime or fraud, *Zolin*, 109 U.S. at 2626, or to discussions of how to structure legally one's conduct in the future, *United States* v. *Hodge & Zweig*, 548 F.2d 1347, 1355 & n.11 (9th Cir. 1977). The attorney-client *communication* itself must be "made for *the purpose* of getting advice for the commission of a fraud or crime." *Zolin*, 109 S.Ct. at 2626 (internal quotations omitted) (emphasis added); *White*, 887 F.2d at 271. The showing must be based upon *facts* showing criminal or illegal conduct, not suspicions. *See In Re*

Grand Jury Proceedings [Lawson], 600 F.2d 215, 219 (9th Cir. 1979) ("The government has made no showing that continuing illegal or fraudulent activity exists on these *facts*. We may suspect that such activity exists, but that is not enough.") (emphasis added).

It is extremely difficult to understand how the conversations on the transcripts can possibly be classified as admissions or evidence of intent to commit future crimes or fraud. Indeed, the court of appeals failed to identify what portions of the conversations it relied upon, or to show how those portions support its holding. Particularly if the district court's decision is reviewed for abuse of discretion or clear error, the court of appeals' decision is inexplicable.

Thus, in a declaration submitted *by the government*,[13] Laurel Sullivan—who participated in both conversations on the tapes—stated in her *only* comment on the communications at issue, "[l]egal advice was also sought to ascertain whether the restructuring could be accomplished *legally*" (Supp.E.R. 70, ¶ 17) (emphasis added). Ms. Sullivan, therefore, explicitly conceded the only relevant issue—that the *communications* at issue were *not* made in furtherance of any crimes or fraud, but only to determine whether the client's objectives could be accomplished legally.[14]

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13 The Advisory Committee's Note to Fed. R. Evid. 104(a) encourages reliance on affidavits to resolve factual determinations under Rule 104(a).

14 It cannot be disputed that every day individuals and corporations by the hundreds seek legal advice to determine if they can achieve financial, tax or other business goals *legally*. Even if it turns out that those goals could not be accomplished legally, mere communication with attorneys, including discussion of options, speculation about the legality of alternatives, and frank acknowledgment of past improprieties and potential future liabilities cannot dispel the privilege if in fact there is no intent to plan or carry out a crime or fraud. *See* McCormick, *Evidence* § 95, at 199 n.48. If the court below's view of the exception prevails, such communications would not be privileged and the fundamental purpose of the privilege will be destroyed—" 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' " *Zolin*, 109 S.Ct. at 2626 (quoting *Upjohn*, 449 U.S. at 389).

The Church also submitted evidence that showed the purpose of the communications was to attempt to achieve a corporate restructuring in a legal manner. Thus, the Declaration of Mr. Murphy shows that his law firm's legal advice in corporate and tax matters concerned the availability of legal options and how to achieve certain goals legally, that the type of legal advice offered was similar to that of other clients seeking to structure corporate and individual relationships, and the law firm, which was involved with this matter on a daily basis, provided no legal advice that could have been construed to further criminal or fraudulent purposes (Church's Supp.E.R. 5-9). The declaration of Lisa Britowich shows that the purpose of the communications were to obtain informed legal advice on how to clarify the legal relationship between the Church and Mr. Hubbard, to ensure the corporate integrity of the parties, and to determine what actions to take to protect the parties' legal interests, necessitated by pending legal action against the Church for past activities (Church's Supp.E.R. 1-4). It is in the context presented by these three declarations by participants in the communications, including the declaration submitted by the government, that the transcripts must be understood.

In the six pages submitted from the first tape, the government's only assertion of crime or fraud is the bald, legally irrelevant assertion that the transcript contains "numerous statements indicating that any restructuring of the Church's corporate entities had to be set up so that Mr. Hubbard retained control of the Church." Government's Opening Br. at 45-46; Gov't. Remand Br. at 6 n.5. The *only* passage from the six pages offered in support of this conclusory assertion is that Church attorney Parcelle stated, "The Directors [of a proposed corporation under consideration] are going to be no more than they've always been. Of no actual authority within the organization." (Supp.E.R. 41).

The transcript, however, reveals an unremarkable discussion of hypothetical ways to restructure lawfully corporate entities of the Church to clarify Mr. Hubbard's legal relationship with the Church in a way that takes cognizance of the ecclesiastical and hierarchical nature of the Scientology reli-

gion. Thus, immediately preceding the above-quoted passage, Parcelle acknowledged the problem: "what we keep trying to do is squeeze a hierarchical, ecclesiastical system into a corporate mold, and the corporate mold always gives way." (*Id.*). Immediately following the passage relied on by the government, Parcelle acknowledged that "the Board of Directors [are] the people who have ultimate control within the corporation." *(Id.)*.

The entire 6-page transcript is a discussion of efforts to reconcile these interests—making clear that Mr. Hubbard is not in day-to-day control of the Church without completely eliminating all ecclesiastical authority he had as Founder of the Scientology religion, and vesting actual management control in a Board of Directors. Thus, the transcript reveals a discussion of creating a trademark trust agreement, in which a Board of Directors would control the Church, unless they violated certain Scientology trademark agreements, which would permit intervention by a separate corporate entity. As Parcelle explained,

> F & P is the enforcement arm of the Trademark Trust and has a perfectly legitimate reason to exist. . . . HCO was supposed to keep [the Church] in line, using the authority of [Mr. Hubbard]. The Trademark Trust could do that from the very highest position. The Directors would then have all their corporate authority except they would be bound by their Trademark agreement. . . .

(*Id.*). How this speculative discussion of a potential corporate structure possibly constitutes planning of future crimes or frauds is never explained by the court or the government. The transcript at most indicates problems with corporate authority in the past; there is no hint of an intent to commit future crimes or frauds.

As to the second tape, the government relies exclusively upon two excerpts, which involve wholly proper—although candid and colorful—discussions of past acts and of possible responses to the potential consequences of those acts. Gov't Remand Br. at 6-8; *See* Supp. E.R. 47, 53-54. These excerpts,

as well as the rest of the transcript, show no planning or furtherance of a *future* crime or fraud. The statements reveal a frank recognition of possible failure to maintain corporate integrity in the past, acknowledgement of a mistake in making a particular payment to Mr. Hubbard, and a discussion of whether or not corporate integrity can or should be maintained in the future.

The first passage upon which the government relies (plus the continuing passage that the government omitted: "And I am not trying to say that what he has done is not worth 2.1 million dollars") (Supp. E.R. 47) shows nothing more than a statement of mutual problems facing Mr. Hubbard and the Church. Mr. Hubbard's concern was not to be held accountable for actions of the Church for which he was not in fact responsible. The Church's concern was that it not be held responsible for certain profit-making activities of Mr. Hubbard, which could cost the Church its tax exempt status. There is absolutely nothing improper in attempting to clarify the legal relationship between Mr. Hubbard and the Church so that it would be clear that Mr. Hubbard was not in control of the Church and hence not responsible for its actions, and so that the Church could not be considered Mr. Hubbard's alter ego, which could endanger its tax exempt status. Thus, there was no planned crime or fraud in "trying to . . . have some sort of structure whereby as much of those two things will continue as long as possible." (*Id.*). The government attempts to cast an evil intent on these conversations based on pure speculation—nowhere supported by the transcript—that Mr. Hubbard would in fact somehow manage and control the Church in an improper manner. The "fraud" is in the government's imagination, not in the evidence before the courts.

As to the second excerpt (Supp.E.R. 53-54), the transcript is explicit that, confronted with a problematic past payment by a corporation known as RRF to Mr. Hubbard, Mr. Parcelle conceded that the only viable option in the upcoming tax trial with the IRS was to explain what actually happened. Thus, he stated that "we will probably handle [the payment] by saying it is part of the same Church, in fact." (*Id.* at 54).

Thus, Parcelle acknowledged the fact that attempts to create corporate integrity had failed, that RRF was in reality part of the Church, and that "it's very difficult to assign significances to things other than what was actually being done at the time." (*Id.*).[15]

In context, it is clear that the concession of lack of corporate integrity in the past is perfectly consistent with the purpose of the MCCS project, "which is to split [Mr. Hubbard] off from the Church and to talk about [*i.e.*, create] the corporate integrity of the different churches" in the future (*Id.*). Again, the only "fraud" is the government's speculation that Mr. Hubbard would control and direct the different corporations in an improper manner.

The government also alleged that the transcript reveals "a blatant discussion of the creation of false documentation" regarding a $2.1 million payment by RRF to Mr. Hubbard for directing, writing and training a film crew for 33 short documentary films he made for the Church. Gov't. Remand Br. at 6. The transcript in fact shows that, after discussion of a fair market value for Mr. Hubbard's services, the attorneys concluded that RRF's payment had been a mistake (Supp. E.R. 53), because it might be viewed as excessive, and therefore it may raise a possible inference of improper inurement.[16] The Church's attorney stated that had the attorneys been consulted in advance, they would have recommended against the payment, because of the possible inurement problem (*Id.* at 48).

After determining that the payment was a mistake, the parties then recommended that the payment be returned and that a fair price be renegotiated (*Id.* at 55). *Nowhere* does the transcript suggest that the fact of the payment or its proposed return and renegotiation be hidden or covered up. A

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15 Thus, in stating that, concerning *past* transactions, RRF "was a sham corporation" (Supp. E.R. 53), Parcelle was conceding that RRF was in fact part of the Church, and did not really have separate corporate integrity.

16 Mr. Hubbard's attorney stated that his services may well have been worth the amount paid, but that a jury might determine otherwise (Supp. E.R. 47).

review of the transcript demonstrates that there is *no* evidence to support the government's claim of the creation of false documentation. As the district court observed, "If you are talking about reversing a transaction, how does that necessarily show a fraud or crime?" (Reporter's Transcript of Hearing of April 30, 1985, at 79) The government could merely speculate, without pointing to any evidence in the record, "In order to try to in effect cover up the past misdeeds." (*Id.*). When pressed by the court to elaborate, the government's attorney stated he had nothing to add to his prior statements (*Id.* at 80).

Even if the evidence might be susceptible to the inferences the government seeks to draw, the district court rejected these inferences after review of all the evidence. That court's findings are amply supported by the record and are entitled to deference from the court of appeals. Certainly, it would be impossible to conclude that the district court's findings were clearly erroneous or an abuse of discretion. *See Inwood Laboratories, supra*, 456 U.S. at 857-58 ("appellate court cannot substitute its interpretation of the evidence" merely because it gives the evidence "a more sinister cast" than the district court).

When the government has challenged the tax exempt status of the Church for past years, it is particularly inappropriate for the government to assert later that the efforts to obtain legal assistance to avoid such problems in the future or to attempt to prepare for the IRS charges constitutes ongoing or future crime or fraud. As James Murphy's declaration makes clear, the advice provided here is the essence of a corporate and tax attorney's practice concerning corporate restructuring and past and future tax consequences, a fact of which the district court was well aware.

If these candid conversations destroy the privilege, as the court below believes, then both attorneys and clients will be reluctant to discuss fully and frankly how to restructure past business and corporate relationships to avoid problems in the future or to prepare a defense to pending or potential prosecution or enforcement proceedings. Such a result is directly contrary to the Supreme Court's clear understanding that cli-

ents must "be free to make full disclosure to their attorneys of past wrongdoings, in order that the client may obtain the aid of persons having knowledge of the law and skilled in its practice." *Zolin*, 109 S.Ct. at 2626 (internal citations and quotations omitted).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Dated: New York, New York
December 18, 1990

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065, 85-6105
D.C. No. CV85-440-HLH
(Central California)
Sept. 19, 1990

UNITED STATES OF AMERICA,
Petitioner/Appellee/Cross-Appellant,

v.

FRANK S. ZOLIN,
Respondent-Appellee,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA, and MARY SUE HUBBARD,
Intervenors/Appellants/Cross-Appellees.

Before:
GOODWIN, Chief Judge, BROWNING, and FARRIS, Circuit Judges.

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065, 85-6105

June 20, 1990

UNITED STATES OF AMERICA,

Petitioner/Appellee/
Cross-Appellant,

v.

FRANK S. ZOLIN,

Respondent-Appellee,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA, and
MARY SUE HUBBARD,

Intervenors/Appellants/
Cross-Appellees.

On Remand from the United States Supreme Court.

Before:

GOODWIN, Chief Judge,
BROWNING, and FARRIS, Circuit Judges.

FARRIS, *Circuit Judge*:

The facts of this case are set forth in our previous opinion, *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987), *aff'd in part and vacated in part*, ____ U.S. ____, 109 S.Ct. 2619,

105 L.Ed.2d 469 (1989). We now resolve whether tapes of two meetings of the Mission Corporate Category Sortout project are admissible under the crime-fraud exception to the attorney-client privilege in light of the Supreme Court's ruling in *United States v. Zolin*, ____ U.S. ____, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989). We hold that the tapes are admissible.

"To invoke the [crime-fraud] exception successfully the party seeking disclosure . . . must make out a prima facie case that the attorney was retained in order to promote intended or continuing criminal or fraudulent activity." *United States v. Hodge & Zweig*, 548 F.2d 1347, 1353, 1354 (9th Cir. 1977). The Government has presented the following evidence of intended illegality: (1) Agent Petersell's Supplemental Declaration of March 8, 1985, (2) Petersell's Supplemental Declaration of March 15, 1985, and (3) partial transcripts of the tapes themselves.[1]

In our first *Zolin* opinion we examined only the independent evidence presented—items one and two above—and held that "while not altogether insubstantial, [this evidence] is not sufficient to make out the requisite prima facie showing of intended illegality." 809 F.2d at 1419. In its decision, the Supreme Court held that

> evidence that is not "independent" of the contents of allegedly privileged communications—like the partial transcripts in this case—may be used not only in the pursuit of *in camera* review, but also may provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies.

Zolin, 109 S.Ct. at 2632 n. 12. We must therefore examine the transcripts and determine whether they, along with the independent evidence already reviewed, demonstrate suffi-

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1 The Government has also attempted to present the declaration of Agent Philip Xanthos as evidence, but we have already denied the Government permission to present this declaration and will not consider it here. *See* March 3, 1987 Order.

cient evidence of intended illegality to establish that the tapes are within the crime-fraud exception. We hold that they do.

The partial transcripts demonstrate that the purpose of the MCCS project was to cover up past criminal wrong-doing. The MCCS project involved the discussion and planning of future frauds against the IRS, in violation of 18 U.S.C. § 371. *See, e.g., United States v. Carruth*, 699 F.2d 1017, 1021 (9th Cir. 1983), *cert. denied*, 464 U.S. 1038, 104 S.Ct. 698, 79 L.Ed.2d 164 (1984). The figures involved in MCCS admit on the tapes that they are attempting to confuse and defraud the U.S. Government. The purpose of the crime-fraud exception is to exclude such transactions from the protection of the attorney-client privilege.

We therefore reject the district court's holding that the Government did not make out a case of intended illegality. In light of the Supreme Court's holding that the tapes themselves can be examined for proof that would establish the crime-fraud exception, the transcripts can be examined, and they appear to make out the Government's case on intended illegality. On remand the district court should admit the MCCS tapes into evidence, subject to any objections the parties might make at that time.[2]

REVERSED AND REMANDED.

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2 The issue of the potential illegality of the transcripts, mentioned by the Supreme Court, *see Zolin*, 109 S.Ct. at 2624 n. 5, is not properly before this court. The Church did not raise this issue in its original appeal, and we will not consider it on a later remand. *See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1547-48 (9th Cir. 1988).

APPENDIX C

Order of United States Court of Appeals

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065; 85-6105
D.C. No. CV85-440-HLH

Filed July 5, 1988

UNITED STATES OF AMERICA,

Petitioner/Appellee/
Cross-Appellant,

v.

FRANK S. ZOLIN,

Respondent-Appellee,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA, and
MARY SUE HUBBARD,

Intervenors/Appellants/
Cross-Appellees.

Before: BROWNING, TANG, PREGERSON, ALARCON, NORRIS, REINHARDT, BEEZER, BRUNETTI, THOMPSON AND LEAVY, Circuit Judges.

ORDER

The opinion published at 842 F.2d 1135 is amended to include the following concurrence:

CONCURRENCE

NORRIS, Circuit Judge, concurring in the result:

I write separately to make it clear that I believe the independent evidence rule has been and should continue to be the law of the circuit. *See United States* v. *Shewfelt*, 455 F.2d 836 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972). However, I cannot join the court's order because the majority has failed to make clear whether the order is a disposition on the merits, *i.e.*, whether it constitutes en banc authority that the *Shewfelt* independent evidence rule is the law of the circuit. If the order is intended to be a disposition on the merits, it is internally inconsistent because an en banc panel cannot both decide a case on the merits and vacate as improvidently granted the order of the full court authorizing it to decide the case.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-6065
85-6105
D.C. No. CV85-440-HLH

UNITED STATES OF AMERICA,
PETITIONER/APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

ORDER AND DISSENT

Order Filed March 28, 1988

Before: BROWNING, Chief Judge, ANDERSON, TANG, PREGERSON, ALARCON, NORRIS, REINHARDT, BEEZER, BRUNETTI, THOMPSON AND LEAVY, Circuit Judges.

Dissent by Judge BEEZER

ORDER

En banc review was ordered in this matter under the mistaken assumption that *United States v. Shewfelt*, 455 F.2d 836 (9th Cir. 1972) and *United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971) were in conflict on the question whether "the government must first establish a prima facie case of fraud independently of the said

[attorney-client] communications," *Shewfelt,* 455 F.2d at 840, before "the privileged status of these communications can be lifted." *Id.* There is no conflict. In *United States v. Friedman*, we did not discuss the showing that the government must make *before* the trial court can examine attorney-client communications to determine whether "the thrust of these . . . conversations was to effectuate a plan of fraud." *Shewfelt,* 455 F.2d at 840. In *Shewfelt* we did, and concluded that the government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality. *Id. Shewfelt* is the law of the circuit.

The dictum in *United States v. King,* 536 F. Supp. 253 (C.D. Cal. 1982) suggesting that *Shewfelt* "does not now appear to be the law in the Ninth Circuit," *id.* at 262, is disapproved. That portion of the three-judge panel opinion in *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987), beginning with the first full paragraph on page 1418 to and including the last full paragraph in the second column on the same page, is ordered withdrawn. The opinion of the three-judge panel will stand in all other respects.

The order dated November 6, 1987, that this matter be reheard en banc, is vacated as improvidently granted.

BEEZER, Circuit Judge, with whom ANDERSON and THOMPSON, Circuit Judges, join, dissenting:

The order that this matter be reheard en banc was not improvidently granted. I dissent.

According to Ninth Circuit Rule 35-1, our order to rehear the matter en banc was entirely appropriate.[1] The independent evidence requirement is a procedure for in-

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[1] Ninth Circuit Rule 35-1 states, "When the opinion of a panel directly conflicts with an existing opinion by another court of appeals

voking the crime-fraud exception to the attorney-client privilege. We adopted this procedure, in a conclusory way, in *United States v. Shewfelt,* 455 F.2d 1076, 1080 (9th Cir. 1972). This procedure has not been endorsed by any other circuit court of appeals. The order filed today thus perpetuates a maverick version of the attorney-client privilege—a rule of national application. In addition, the attorney-client privilege, as a rule of evidence for the federal courts, has an overriding need for national uniformity. Considering that this circuit's position clashes with that of a majority of other circuits, our order that we rehear this matter en banc was most providently granted.

I

The crime-fraud exception defeats the attorney-client privilege. To invoke the exception, the government must make a prima facie showing that an otherwise privileged communication is in furtherance of fraud or crime. In this circuit the government has had to make the prima facie showing by the use of independent evidence—evidence other than the suspect communication itself. Elsewhere the government has been able to make the prima facie showing by the court's in camera inspection of the suspect communication. The substantive issue in this en banc case is: should we overrule *Shewfelt,* eliminate the independent evidence requirement, and allow in camera inspection of suspect communications? We should.

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and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc."

II

Every circuit to face the situation this case presents has allowed in camera inspection. In reverse chronological order, they are the Sixth, Second, D.C., Eighth, Third, and Fourth Circuits.[2] Following is a sample of the cases.

Sixth: *In Re Antitrust Grand Jury*, 805 F.2d 155, 168-169 (6th Cir. 1986).

Second: *In Re Grand Jury Subpoena Duces Tecum*, 798 F.2d 32 (2d Cir. 1986); *In Re John Doe Corp.*, 675 F.2d 482, 486 and 490 (2d Cir. 1982).

D.C.: *In Re Sealed Case*, 754 F.2d 395, 399-401 (D.C. Cir. 1985) (IRS case closely resembling case now before us); *In Re Sealed Case*, 676 F.2d 793, 815 (D.C. Cir. 1982).

Eighth: *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 280 (8th Cir. 1984); *In Re Berkley & Co.*, 629 F.2d 548, 553 (8th Cir. 1980); *In Re Murphy*, 560 F.2d 326, 331 and 338 n.23 (8th Cir. 1977); *Pfizer Inc. v. Lord*, 456 F.2d 545, 551 (8th Cir. 1972) (per curiam).

Third: *In Re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 800 (3d. Cir. 1979).

Fourth: *Union Camp Corp. v. Lewis*, 385 F.2d 143, 144 (4th Cir. 1967).

III

Other circuits have not always addressed the underlying policy question in allowing in camera review for purposes of the crime-fraud exception. As an en banc panel

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[2] The Church of Scientology fails to distinguish these cases in any principled way. The Church does point out, correctly, that one of the D.C. cases only represents the views of one member of that court. *See In Re Sealed Case*, 676 F.2d 793, 815 (D.C. Cir. 1982)(J. Skelly Wright).

establishing the law of this circuit, however, we are obligated to address the policy question.

In particular, we are charged with evaluating the tradeoff between maintaining confidentiality and prosecuting crimes. In addressing this policy question, the Second Circuit considered an additional factor, grand jury secrecy. Grand jury secrecy would rest on the scale alongside maintaining confidentiality, weighing *against* in camera inspection; still the Second Circuit found that the balance tipped in favor of in camera inspection. *In Re John Doe Corp.*, 675 F.2d at 490.

The need to prosecute crimes strongly supports in camera inspection. The attorney-client privilege was not designed to protect communications in furtherance of fraud or crime. When a communication, otherwise within the privilege, itself furthers fraud or crime, independent evidence of that fact rarely will be available. In such cases the independent evidence requirement would simply insulate dishonest parties from prosecution. *See United States v. King*, 536 F.Supp 253, 262 (C.D. Cal. 1982) (declining to follow *Shewfelt's* independent evidence requirement).

Church of Scientology suggests that in camera inspection would undermine several important policies. First, inspection would allow the crime-fraud exception to eviscerate the attorney-client privilege. According to the Church, the possibility of inspection could "chill open attorney-client discussions." The fact that the inspections take place in camera, however, mitigates any chilling effect. A judge is not a prosecutor and will not expose discussions that are unrelated to the fraud or crime alleged.

Second, according to the Church, inspection would force courts to review "any and all attorney-client com-

munications upon the mere allegation by a party . . . that the crime-fraud exception applies." The fear of disclosure of even innocent communications would give prosecutors an unfair litigation advantage, and courts would incur the intolerable burden of reviewing file after file of communications.

In fact, the fear of disclosure of innocent communications would be reduced if the Ninth Circuit eliminated the independent evidence rule. In camera inspection would allow a district court more precisely to determine which communications further crime or fraud and which do not. *Compare In Re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986).

In any case, the predicate for the Church's conclusions is incorrect: in camera inspection need not force courts to review any and all documents alleged to fall within the crime-fraud exception. I would set out a rule that gives district courts discretion. Besides helping to prevent prosecutorial fishing expeditions, a rule affording discretion to district courts would allow those courts to regulate their burden of in camera review.

A district court, faced with an argument that the crime-fraud exception applies, would decide for itself whether a given case warrants in camera review. A district court would exercise its discretion to conduct in camera review according to the circumstances—including the presence or absence of circumstantial and other independent evidence. In a proper case, a district court might *reject* the crime-fraud exception without in camera review: without inspecting all documents alleged to evidence crime or fraud, or even without inspecting any documents—without hearing all conversations alleged to evidence crime or fraud, or even without hearing any conversations.

For additional protection of privileged documents—to avoid disclosure of innocent documents—I would also set out a rule that requires district courts to *allow* the crime-fraud exception only in relation to communications that the court individually has inspected in camera. This approach would be in line with the Sixth Circuit's position. In *In Re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986), the Sixth Circuit required the district court to review documents in camera before ordering them produced:

> Not only do we believe *in camera* review is mandated to determine the scope of the order, *in camera* review of the documents could have assisted the court in determining whether a *prima facie* violation had been made.

Church of Scientology hints that inspection would undermine another policy, that of supporting adversarial argument. In endorsing in camera review, the Second Circuit decided that limitations on adversarial argument are outweighed by the need to resolve an evidentiary question while preserving confidentiality. 675 F.2d at 490. In any case, the independent evidence rule itself does not support adversarial argument insofar as the subject of the argument—the communication alleged to be in furtherance of crime or fraud—is available to one party and not the other. At best a distorted form of adversarial argument can occur.

Finally, according to the Church, Federal Rule of Evidence 104(a) and *Bourjaily v. United States*, 107 S.Ct. 2775 (1987), indicate that a court making preliminary inquiries about a privilege must abide by preexisting evidence rules such as the indpendent evidence requirement. Rule 104(a), however, is not on point. The rule deals with questions about the existence of a privilege, not about an exception to a privilege:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Church of Scientology gains no support for the independent evidence requirement by analogy to Rule 104(a). In the Ninth Circuit the rules of evidence with respect to privileges do allow for in camera review: a court undertakes in camera review of documents to decide whether the attorney-client privilege even exists with respect to those documents. *In Re Grand Jury Witness,* 695 F.2d 359, 362 (9th Cir. 1982).

Church of Scientology garners no support from *Bourjaily.* In that case the Supreme Court held that a showing to admit a co-conspirator's statement under Rule 801(d)(2) need not rely on independent evidence, but may rely on the statement itself. If anything *Bourjaily* suggests that a court may indeed examine suspect communications when considering the crime-fraud exception. *Compare* 107 S.Ct. at 2780.

Accordingly, I would overrule *Shewfelt,* eliminate the independent evidence requirement, and allow in camera inspection of suspect communications. The way I would formulate the rule, however, would dictate that we affirm the district court in this case.

IV

The government argues that the district court abused its discretion by rejecting the crime-fraud exception without inspecting all the tape recorded communications known to the government. According to the rule I have described, a

district court would be within its discretion to *reject* the exception without inspecting all suspect communications or even any communications. In this case the government submitted only a partial transcript of material to the district court. When the government submitted that partial transcript, the government was aware of the entire contents of the tapes. *See* Government's Brief at 12 (discussing Xanthos Declaration submitted to district court on motion for reconsideration). The district court was entitled to rely on the government to highlight, to the best of its ability, those parts of the tapes that might fall within the crime-fraud exception.

On appeal the government asks us to order the district court to inspect those parts of the tapes that were not within the partial transcript. In the district court, however, the government did not indicate that a partial transcript was an inadequate basis for a ruling on the crime-fraud exception. *See* Denial of Motion for Reconsideration, Government's Supplemental Excerpt of Record at Tab 80. The government never explained why it had failed to include the other parts of the tapes in the partial transcript in the first place. *Id.* The district court was well within its discretion to consider only the partial transcript, and the district court did not abuse its discretion in rejecting the crime-fraud exception.

V

We should overrule *Shewfelt* and eliminate the independent evidence requirement. An appropriate rule would make in camera review discretionary for the district court to reject the crime-fraud exception, mandatory for the district court to allow the exception and order disclosure. In this case the district court did not abuse its discretion by rejecting the exception without a complete review.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065, 85-6105

UNITED STATES OF AMERICA,
PETITIONER/APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

Nov. 6, 1987

Prior Report: 809 F.2d 1411.

Before: BROWNING, Chief Judge, GOODWIN, WALLACE, KENNEDY, ANDERSON, HUG, TANG, SCHRODER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON O'SCANNLAIN, AND LEAVY, Circuit Judges.

ORDER

Upon the vote of a majority of the nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The previous three-judge panel assignment is withdrawn.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065; 85-6105
D.C. No. CV85-440-HLH

UNITED STATES OF AMERICA,
PETITIONER/APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

OPINION

Argued and Submitted
November 6, 1986—Pasadena, California

Filed February 9, 1987

Before: JAMES R. BROWNING, Chief Judge, ALFRED T. GOODWIN AND JEROME FARRIS, Circuit Judges.

Opinion by Judge FARRIS

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

OPINION

FARRIS, Circuit Judge:

In July 1984, the Criminal Investigation Division of the IRS (Los Angeles District) began investigating L. Ron Hubbard's tax returns for the tax years 1979 through 1983. In October, the IRS served an administrative summons on the Clerk of the Los Angeles County Superior Court and requested that he produce certain documents relating to Hubbard's potential tax liability. (The Superior Court had obtained the documents in connection with an unrelated proceeding brought by the Church against a former member of the Church.) The Clerk willingly produced a number of documents, but refused to produce thirteen documents which had been ordered sealed by the Superior Court.

In January 1985, the Government initiated this action in an effort to compel the Clerk to produce the thirteen sealed documents. Shortly thereafter, the district court granted the motions to intervene which were brought by the Church and Mary Sue Hubbard. The Intervenors contended that each of the thirteen documents was either privileged, irrelevant, or both. They also argued that the summons was unenforceable because it was not issued pursuant to a "good faith" tax investigation.

Hearings were held in March and April. On April 30, 1985, the district court ruled that eight of the documents—exhibits 4-D, 4-E, 4-F, 4-G, 5-C, 5-G, 5-I, and 6-B—were irrelevant, privileged, or both, and did not need to be produced. It ruled that five documents—exhibits 5-K, 5-L, 5-O, 5-P, and 6-O—should be produced, but prohibited the IRS from disclosing them to another governmental agency except in connection with a criminal tax prosecution or with the court's approval. The court

further ruled that the Intervenors had failed to prove that the summons was not issued in "good faith."

The Intervenors filed timely notice of appeal on July 1, 1985. The Government filed timely notice of cross-appeal on July 15, 1985. The order appealed from is a final order which disposes of all claims of all parties. We have jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

A. *Mootness*

On January 24, 1986, during the pendency of this appeal, L. Ron Hubbard died. The Intervenors argue that because Hubbard's death has foreclosed the possibility of any further investigation of Hubbard's potential criminal tax liability, this proceeding has become moot. We reject the argument for the reason stated in *United States v. Author Services,* 804 F.2d 1520, 1522 n.1 (9th Cir. 1986).

B. *Relevance of Exhibits 5-O, 5-P, and 6-O*

The IRS' power to examine records in connection with tax investigations is broadly construed. *See Liberty Financial Services v. United States,* 778 F.2d 1390, 1392 (9th Cir. 1985); *De Masters v. Arend,* 313 F.2d 79, 87 (9th Cir. 1963). The relevance of such evidence depends on whether it might throw light on the correctness of a taxpayer's returns. *United States v. Goldman,* 637 F.2d 664, 667 (9th Cir. 1980). The Government must demonstrate a "realistic expectation" of relevance, rather than an "idle hope" of relevance. *Id.* (quoting *United States v. Harrington,* 388 F.2d 520, 524 (2d Cir. 1969).

The Government bases its claims that the three exhibits are relevant on the declaration of Agent Petersell, in which Petersell stated:

> I have read the Petition to Enforce Internal Revenue Service Summons. Each of the items listed . . . is relevant to the investigation of L. Ron Hubbard in one or more of the following respects:
>
> A. Determining the extent to which income from the Church of Scientology inured to the benefit of L. Ron Hubbard.
>
> B. Determining whether L. Ron Hubbard conspired with others to impair and impede the Internal Revenue Service in the admiistration of the tax laws.
>
> C. Determining whether any violations of the Internal Revenue laws were done willfully with intent to evade tax.

The Government's other evidence of relevancy consists of three terse descriptions of the documents' contents in the petition for enforcement of the summons:

00000(5-0)	LRH note regarding the Mayor of Clearwater, Florida, 22 March 1978.
PPPPP (5-P)	LRH Statement regarding money from Scientology, 16 Feb. 1978.
000000(6-0)	LRH handwritten note regarding the Fair Game policy.

The record does not indicate the Government's sources for this information.

While the Government might have made a better showing, the district court did not clearly err in concluding that Petersell's declaration, when coupled with the general descriptions of the documents in the petition to enforce the summons, was sufficient to establish the relevance of the documents. We do not ignore our statement in *Goldman:*

> The Government's burden, while not great, is also not non-existent. The Government appears to argue that

the mere assertion of relevance by [an IRS agent] satisfied that burden. Even to the extent this might be true for records concerning the tax years being examined, relevance is not so clear when records for other years are sought.

Goldman, 637 F.2d at 667. Notwithstanding the fact that exhibits 5-O, 5-P, and 6-O all relate to years other than the tax years under investigation, we are satisfied that the district court, after balancing the indicia of relevancy against the impossibility of fully knowing the documents' contents before an actual review, did not clearly err in determining that the documents "might throw light" on the correctness of L. Ron Hubbard's return information.

C. Waiver of Privilege As to Exhibits 5-K and 5-L

The Intervenors do not contest on appeal the relevance of exhibits 5-K and 5-L. Instead, they contend that the district court erred in ruling that privileges which might otherwise have applied to the two documents were waived by a voluntary delivery of the documents to Gerald Armstrong. In addition, they argue that the district court erred when it concluded that exhibit 5-L would not be protected by the attorney-client privilege even in the absence of waiver because the affidavit of Hubbard's former attorney was too vague and conclusory to validly assert the privilege.

The attorney-client privilege is to be strictly construed *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). *See* 8 J. Wigmore, *Evidence* § 2291 at 554 (McNaughton rev. 1961). The logic behind the strict construction of the attorney-client privilege applies with equal force to the marital communications privilege: like the attorney-client privilege, the marital communications privilege is "an obstacle to the

investigation of the truth. . . . [that] ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." *Id.* The burden of demonstrating the existence of an evidentiary privilege rests on the party asserting the privilege. *See United States v. Gann*, 732 F.2d 714, 723 (9th Cir. 1984) (attorney-client privilege); *Weil*, 647 F.2d at 25 (evidentiary privileges generally). In order to establish the applicability of the attorney-client privilege to a given communciation, the party asserting the privilege must affirmatively demonstrate non-waiver. *See id.; United States v. Landof*, 591 F.2d 36, 38 (9th Cir. 1978).

The voluntary delivery of a privileged communication by a holder of the privilege to someone not a party to the privilege waives the privilege. *See Clady v. County of Los Angeles*, 770 F.2d 1421, 1433 (9th Cir. 1985) (the voluntary disclosure of a privileged attorney-client communication constitutes waiver); *United States v. McCown*, 711 F.2d 1441, 1452-53 (9th Cir. 1983) (the marital communications privilege is inapplicable to communications not intended to remain confidential); *Weil*, 647 F.2d at 24 (the voluntary disclosure of a privileged attorney-client communication constitutes waiver). Moreover, when the disclosure of a privileged communication reaches a certain point, the privilege may become extinguished even in the absence of a wholly voluntary delivery. *See In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege."). Whether the circumstances of the delivery of exhibits 5-K and 5-L to Armstrong gave rise to a waiver of the otherwise applicable privileges is a mixed question of law and fact that we review *de novo*. *See United States v. McConney*, 728 F.2d 1195, 1199-1204 (9th Cir. 1984) (en banc).

The district court held that all privileges potentially applicable to exhibits 5-K and 5-L were waived by a voluntary delivery of the documents to Gerald Armstrong. We agree. The Intervenors argue that the delivery could not have been voluntary since the correspondence between Armstrong and Hubbard contains no express indication that Armstrong intended to, or had Hubbard's permission to, collect communications between Hubbard and his wife or between Hubbard and his attorneys.

Although Hubbard did not explicitly grant Armstrong access to attorney-client or marital communications, Hubbard did, in a memorandum to Armstrong, grant Armstrong general permission to collect documents relevant to the proposed biography of Hubbard. The Intervenors' only argument in support of non-waiver is that Hubbard did not specifically grant Armstrong access to attorney-client and marital communications. More is required.

Since the attorney-client privilege which might otherwise have attached to exhibit 5-L was waived, we need not consider whether the attorney-client privilege was validly asserted by Hubbard's former attorney.

D. ***Limited Evidentiary Hearing***

We review for abuse of discretion. *See United States v. Stuckey*, 646 F.2d 1369, 1373 (9th Cir. 1981). *See generally Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984) (a district court's decisions relating to discovery matters are reviewed for abuse of discretion).

The purpose of the limited evidentiary hearing was to determine whether the summons enforcement proceeding was legitimate and in "good faith," rather than merely camouflage for an ulterior non-tax motive. The "good faith" standard seeks to prevent the IRS from becoming an information-gathering agency for other governmental

agencies. *See United States v. LaSalle National Bank,* 437 U.S. 298, 317 (1978); *Stuckey,* 646 F.2d at 1373. The task is to identify " 'those rare cases where bald allegations of harassment or improper purpose can be substantiated.' " *Author Services,* 804 F.2d at 1523 (quoting *United States v. Church of Scientology of California,* 520 F.2d 818, 824 (9th Cir. 1975)). The focal issue is whether an IRS investigation is motivated by legitimate tax purposes. *See United States v. Powell,* 379 U.S. 48, 57-58 (1964). The district court may properly limit evidentiary hearings on the "good faith" issue to prevent a frustration of legitimate Government objectives. *Church of Scientology,* 520 F.2d at 823-25.

The Intervenors argue that the district court improperly limited its inquiry to the issue of whether the summons itself was issued in "good faith," and ignored and larger issue of whether the overall investigation was in "good faith." We reject the argument. At the hearing, C. Phillip Xanthos, the Branch Chief of the IRS Criminal Investigation Division (Los Angeles District), specifically testified as to the legitimate tax-determination objectives of the investigation. This and other testimony was sufficient to support the district court's finding that the summons was issued in "good faith." *See LaSalle National Bank,* 437 U.S. at 317. *See also Stuckey,* 646 F.2d at 1376; *United States v. Zack,* 521 F.2d 1366, 1368-69 (9th Cir. 1975).

E. *Restrictions on IRS Disclosure of the Summoned Documents*

The district court ordered that "the documents produced in response to the summons shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." We review the district court's order for abuse

of discretion. *See United States v. Columbia Broadcasting System,* 666 F.2d 364, 368 (9th Cir. 1982).

The Government argues that the district court's order conflicts with the disclosure provisions of 26 U.S.C. § 6103. Those provisions, the Government suggests, are the exclusive limitations upon IRS disclosure of return information. In addition, the Government argues that the order represents an improper attempt to enjoin the IRS from obeying a duly enacted federal law.

We recently rejected this argument in *Author Services,* and held that a district court's order restricting the IRS' ability to disclose summoned materials to other governmental agencies, "[r]ather than being an abuse of discretion, . . . [could] be a wise exercise of control." *Author Services,* 804 F.2d at 1526. The district court's order in this case created a mechanism whereby the district court could monitor the IRS' use of the summoned documents. This is an appropriate exercise of the district court's discretion: "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *Powell,* 379 U.S. at 58. *See S.E.C. v. ESM Government Securities, Inc.,* 645 F.2d 310, 316-17 (5th Cir. 1981). A district court may, when appropriate, condition enforcement of a summons on the IRS' agreeing to abide by disclosure restrictions. *Author Services,* 804 F.2d at 1525 (citing *United States v. Texas Heart Institute,* 755 F.2d 469, 481 (5th Cir. 1985)).

The Intervenors also argue that the district court's order violates 26 U.S.C. § 7421(a) (the "Anti-Injunction Act"), because it has the effect of enjoining the IRS from disclosing the summoned tax information. We reject the argument for the reasons stated in *Author Services,* 804 F.2d at 1526.

F. *Exhibit 5-C ("the Tapes")*

The district court's rulings on the scope of the attorney-client privilege involve mixed questions of law and fact, and are reviewable *de novo*. *See McConney*, 728 F.2d at 1202. Where the relevant scope of the attorney-client privilege is clear and the decision that the district court must make is essentially factual, however, the district court's rulings as to the privilege are reviewed for clear error. *Id.* at 1200.

The Government contends that the district court erred in finding that the "common interest" rule covered the tapes. The "common interest" rule protects communications made when a nonparty sharing the client's interests is present at a confidential communication between attorney and client. The paradigm case is where two or more persons subject to possible indictment arising from the same transaction make confidential statements that are exchanged among their attorneys. *See Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965).

The Government is incorrect, however, in arguing that the "common interest" rule is limited to such a case. Even where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications. *See Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 44-45 (D. Md. 1974); *Stanley Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551, 554-55 (N.D. Ill. 1964).

The district court found that the parties present at the meetings recorded on the tapes "had a common interest" in sorting out the respective affairs of the Church and Mr. Hubbard. We agree. All of the non-lawyers present at the meeting were employees of the Church.

The Government also challenges the district court's finding that the Church did not waive its attorney-client privilege when it inadvertently delivered the tapes to Armstrong. (Hubbard's personal secretary gave Armstrong the tapes under the mistaken impression that they were blank.) In *Transamerica Computer Co., Inc. v. International Business Machines, Corp.*, 573 F.2d 646 (9th Cir. 1978), we held that whereas a waiver of the attorney-client privilege occurs when a holder of the privilege voluntarily discloses the privileged matter, no waiver occurs if the holder has no opportunity to claim the privilege or if the holder was erroneously compelled to disclose the privileged matter. *Id.* at 651. The secretary's delivery of the tapes to Armstrong was sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver.

The Government challenges the district court's ruling that the "crime-fraud" exception to the attorney-client privilege did not apply to the tapes. The attorney-client privilege does not protect communications that further a crime or fraud. *See United States v. Hodge and Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977). The Government had the burden of making a prima facie showing that the attorney-client communications recorded on the tapes were in furtherance of an intended or present illegality. *Id.* We agree with the district court's conclusion that the Government failed to satisfy this burden.

The Intervenors argue that the Government's evidence of crime or fraud must come from sources independent of the attorney-client communications recorded on the tapes. In support of this argument, they cite *United States v. Shewfelt*, 455 F.2d 836 (9th Cir. 1972). In *Shewfelt*, we said that "before the privileged status of [attorney-client] communications can be lifted, the government must first establish a prima facie case of fraud *independently* of said communications." *Id.* at 840 (emphasis added). Notwith-

standing *Shewfelt*, the Government argues that in assessing the applicability of the "crime-fraud" exception to the tapes the district court should have considered evidence of the contents of the tapes which the Government presented to the court.

Shewfelt's independent evidence requirement has been strongly criticized. In *In re Berkley and Co., Inc.*, 629 F.2d 548, 553 n.9 (8th Cir. 1980), the Eighth Circuit observed that the two cases cited in *Shewfelt*, assertedly in support of the independent evidence requirement, in fact simply state that a party seeking disclosure under the "crime-fraud" exception must make a prima facie showing of crime or fraud in order to shift the burden of showing the inapplicability of the exception to the party resisting disclosure.

In the fourteen years that have passed since *Shewfelt* was decided, only one court has cited it as authority for the independent evidence requirement. *See Kockums Industries Limited v. Salem Equipment, Inc.*, 561 F. Supp. 168, 171 (D. Ore. 1983). By contrast, a number of courts have rejected the *Shewfelt* position. *See, e.g., In re Sealed Case*, 676 F.2d at 815; *In re Special September 1978 Grand Jury*, 640 F.2d 49, 59 (7th Cir. 1980); *In re Berkley*, 629 F.2d at 553 n.9; *Coleman v. American Broadcasting Companies, Inc.*, 106 F.R.D. 201, 207 n.9 (D.D.C. 1985); *United States v. King*, 536 F. Supp. 253, 262 (C.D. Cal. 1982).

In *Hodge and Zweig*, we discussed the "crime-fraud" exception at length without ever referring to *Shewfelt*. 548 F.2d at 1354-55. Instead, we cited repeatedly to *United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971), a decision which implicitly recognized that a district court may examine the disputed communications themselves in order to determine the applicability of the "crime-fraud" exception. *Id.* at 1354.

In this case, the communications recorded on the tapes appear to be the Government's best evidence establishing the applicability of the "crime-fraud" exception. This is not surprising, since the illegal advice allegedly given by Church attorneys to Church officials is an integral part of the intended illegality that the Government seeks to establish. In this connection, the court's observation in *King* is pertinent: "[S]ince the illegal advice is usually given in the attorney-client setting, applying *Shewfelt* to such cases would, in most instances, simply serve to insulate dishonest attorneys from prosecution for obstruction of justice." *King*, 536 F. Supp. at 262.

In *King*, the court speculated that "the independence test set forth in *Shewfelt* does not appear to be the law in the Ninth Circuit." *Id.* We cannot agree. Whatever the merits of the criticisms that have been leveled against *Shewfelt*'s independent evidence requirement, we are bound to adhere to our holding in *Shewfelt* unless and until it is reversed by an *en banc* panel of this court. *See United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1986); *Atonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120, 1132 n.6 (9th Cir. 1985).

The Government's independent evidence of intended illegality consists primarily of: 1) Agent Petersell's Supplemental Declaration of March 8, 1985, in which Petersell stated that his discussions with Gerald Armstrong had given him reason to believe that the communications recorded on the tapes focused generally on the intentional violation of the tax laws; and 2) Petersell's Supplemental Declaration of March 15, 1985, in which Petersell stated that his discussions with three other former Church employees had given him reason to believe that the communications recorded on the tapes specifically focused on i) a proposed scheme whereby the Church's cash transfers to Hubbard would be disguised as payments for services

rendered (allegedly to insulate Hubbard from tax liability and to protect the Church's tax-exempt status), and ii) a proposed scheme whereby Hubbard would be able to control royalty income derived from the "Trademark Trust" (a trust that was created to manage Hubbard's various Scientology-related and other trademarks) without that control being traceable to him.

We agree with the district court that this evidence, while not altogether insubstantial, is not sufficient to make out the requisite prima facie showing of intended illegality.

AFFIRMED.

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 85-0440-HLH

UNITED STATES OF AMERICA

v.

FRANK ZOLIN

CIVIL MINUTES – GENERAL

Date June 10, 1985

PRESENT: Hon: HARRY L. HUPP, Judge

ATTORNEYS PRESENT FOR PLAINTIFFS:
Robert S. Horwitz, AUSA C. Magnusen

ATTORNEYS PRESENT FOR DEFENDANTS:
Gordon, Trask, Donald Randolph,
Michael Lee Hertzberg (for intervenors)

PROCEEDINGS: Plaintiff's Motion for Reconsideration

The motion for reconsideration of the court's order of April 30, 1985, is denied.

Plaintff complains that the court should have listened to the tapes in toto. While this was at one time discussed with counsel, thereafter Mr. Petersell's declaration was sub-

mitted, and no one suggested that this was an inadequate basis on which to determine the attorney-client privilege question. Mr. Xanthos' declaration stands on a similiar footing; no reason is suggested as to why it could not have been submitted as a part of the materials considered in the April hearings.

Plaintiff also complains that the court should not have restricted the IRS from disclosing for other governmental purposes the contents of the documents ordered produced. Since the entire basis of the summons proceeding was to obtain material for a tax investigation, the court thinks it reasonable to restrict the use of the material for that purpose, unless a criminal prosecution is instituted. If exigencies of other litigation make it necessary, the IRS is free to make its case for an exception to this court.

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-0440-HLH

UNITED STATES OF AMERICA, PETITIONER

vs.

FRANK S. ZOLIN, CLERK OF THE SUPERIOR COURT, RESPONDENT

CHURCH OF SCIENTOLOGY OF CALIFORNIA, INTERVENOR

[Filed Apr. 30, 1985]

ORDER

The Court makes the following Orders and Findings:

1. Reconsideration is denied as to Exhibits 5G and 5I; the Order of March 12, 1985 will stand.

2. Intervenor Church has failed to raise any doubt of the good faith of the Internal Revenue Service in pursuing this summons enforcement proceeding. Specifically, it is found that a bona fide criminal tax investigation of L. Ron Hubbard is being conducted by the IRS for the years 1979-83, that the matter has not been referred to the Department of Justice for prosecution, that the summons was validly issued pursuant to that investigation, that the agent issuing the summons was in good faith in doing so, and did not do so for an improper purpose, or to harass the taxpayer, or for a collateral purpose. No further discovery on this issue is warranted.

3. With the exception of Exhibits 6B and 5C (the "MCCS tapes"), the Court finds that all potentially applicable privileges (attorney-client, marital) have been waived by voluntary delivery of the material to Gerald Armstrong. In addition, no privilege has been validly asserted by the holder of a potential privilege as to certain items (Exhibits 5L and 5P).

4. Sufficient relevancy being shown, the IRS is entitled to inspect and copy Exhibits 5K, 5L, 5O, 5P and 60, and the summons is to be enforced as to those items.

5. No relevancy or waiver has been shown for Exhibit 6B, and it need not be produced.

6. As to Exhibit 5C (the "MCCS tapes"), the Court finds:

(a) The tapes consist of confidential communications between attorneys and clients or clients' authorized agents.

(b) The confidential communications were between clients and their attorneys who had a common interest; the privilege was, therefore, not destroyed by publication of the communication to an outsider.

(c) There was no waiver of the privilege by delivery to an outsider, the Court finding that the tapes were delivered to Gerald Armstrong by mistake, and, in addition, that Petitioner has not carried the burden of showing waiver.

(d) The "fraud-crime" exception to the attorney-client privilege does not apply. The quoted excerpts tend to show or admit past fraud but there is no clear indication that future fraud or crime is being planned.

(e) The Order sealing the Petersell affidavit (filed March 15, 1985) quoting excerpts from the tapes will remain sealed.

(f) This Court's copy of the tapes will remain sealed in possession of the Court's Clerk until after any appellate

review of this Order, after which it is to be returned to the Superior Court. The Clerk of the Superior Court need not produce its copy of the tapes pursuant to the summons.

7. The documents delivered hereunder shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained.

Petitioner is to prepare an Order in accord with this Order and the Order of March 12, 1985. This Order is stayed for sixty (60) days, and thereafter if an appeal or application for a writ is filed and until decision on appeal or writ application is rendered.

IT IS SO ORDERED.

DATED: April 30, 1985.

/s/ HARRY L. HUPP

HARRY L. HUPP
United States District Judge